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SUPREME COURT, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1958

No. 768

ROBERT F. MINNEY,

Appellant,

vs.

CITY OF AZUSA, a Municipal Corporation,

Appellee.

APPEAL FROM THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

STATEMENT AS TO JURISDICTION

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INDEX

Subject Index

	PAGE
Statement as to jurisdiction	1
Opinion	1
Jurisdiction	2
Ordinance involved	3
Constitutional provisions invoked	5
Questions presented	6
Statement of the case	7
Nature of action	7
Summary of the material facts	8
How federal questions raised and determined	13
All questions raised are substantial	13
I. Exclusion of churches while allowing other public buildings	13
II. Exclusion of the churches from over ninety percent of city	16
III. Ordinance grants unlimited discretion to City Council	19
IV. Discrimination between appellant and other religions	20
V. Court erred in resting decision on presumption of constitutionality of Ordinance and City Council action	22
VI. Reasons of City Council insufficient to deny right guaranteed by First Amendment	23
Conclusion	26
Appendix A (Judgment of District Court of Appeal)	27
Appendix B (Order of Supreme Court of California denying hearing)	28
Opinion of District Court of Appeal	*Bound separately*

Cases Cited

PAGE

American Railway Express Co. v. Levee
263 U. S. 19 (1923) 2
American Communications Association v. Douds
339 U. S. 382 (1950) 25, 26
Ashcroft v. Tennessee
322 U. S. 143 18
Busey v. District of Columbia
138 F. 2d 592 (D.C. Cir. 1943) 22, 23
Cantwell v. Connecticut
310 U. S. 296 (1940) 20, 24
Congregation Temple Israel v. City of Creve Coeur
— S. W. 2d — (S.Ct. Mo. Jan. 12, 1959, No. 46,597) 19
Corporation of Presiding Bishop v. City of Porterville
90 Cal. App. 2d 656, 203 P. 2d 823 (1949); 338 U. S. 805 ..... 15, 16, 25, 26
Craig v. Harvey
331 U. S. 367 ..... 18, 21
Danskin v. San Diego Unified School District
28 Cal. 2d 536, 171 P. 2d 885 (1946) 20
Fiske v. Kansas
274 U. S. 380 18
Follett v. Town of McCormick
321 U. S. 573 (1944) 24
Fowler v. Rhode Island
345 U. S. 67 (1953) 14, 20
Jamison v. Texas
318 U. S. 413 (1943) 3
Largent v. Texas
318 U. S. 418 (1943) 3, 20, 24
Lovell v. City of Griffin
303 U. S. 444 (1938) 20, 24
Mares, In re
75 Cal. App. 2d 798, 806, 171 P. 2d 762 (1946) .. 22, 24

PAGE

Martin v. City of Struthers
319 U. S. 141 (1943) 24
Michigan-Wisconsin Pipe Line Co. v. Calvert
347 U. S. 157 (1954) 2
Minney v. City of Azusa
164 A. C. A. 16, 330 P. 2d 255 (Oct. 3, 1958) 1
Mooney v. Village of Orchard Lake
333 Mich. 389, 53 N. W. 2d 308 (1952) 19, 25
Murdock v. Pennsylvania
319 U. S. 105 (1943) 24
Niemotko v. Maryland
340 U. S. 268 (1951) 14
Norris v. Alabama
294 U. S. 587 18
Pittsford v. City of Los Angeles
50 Cal. App. 2d 25, 122 P. 2d 535 (1942) 22, 24
Porterfield, In re
28 Cal. 2d 91, 168 P. 2d 706 (1946) 21, 23
Roman Catholic etc. Corp. v. City of Piedmont
45 Cal. 2d 325, 289 P. 2d 438 (1955) 15, 22, 23, 25
Saia v. New York
334 U. S. 558 (1948) 20, 24
Schneider v. New Jersey
308 U. S. 147 (1939) 24, 26
Skinner v. Oklahoma
316 U. S. 535 (1942) 14, 20
Stratton v. Stratton
239 U. S. 55 (1915) 2
State ex rel. Synod of Ohio v. Joseph
139 Ohio St. 229, 39 N. E. 2d 515 (1942) 22, 23
Terminiello v. City of Chicago
337 U. S. 1 (1949) 23
Thomas v. Collins
323 U. S. 516 (1945) 22, 23, 24

Cases Cited *continued*

	PAGE
Thornhill v. Alabama 310 U. S. 88 (1940)	24
Trustees of First M. E. Church South v. Atlanta 76 Ga. 181 (1886)	14
Underhill v. Board of Appeals of Town of Oyster Bay 273 App. Div. 788, 75 N.Y.S. 2d 327; 297 N.Y. 937, 80 N. E. 2d 342 (1947)	20
United States v. Carolene Products Co. 304 U. S. 144 (1938)	22, 23
West Virginia State Board of Education v. Barnette 319 U. S. 624 (1943)	24
Yick Wo v. Hopkins 118 U. S. 356 (1886)	14, 20

Statutes Cited

California Rules on Appeal, Rule 29 (b)	18
Ordinance No. 409 of the City of Azusa	3, 4, 5, 7, 9, 13, 14
Ordinance No. 441 of the City of Azusa	4, 5
Ordinance No. 455 of the City of Azusa	4, 14, 16, 19
28 U. S. C. § 1257 (2)	2
United States Constitution	
Amendment I	5, 6, 7, 13, 20, 23
Amendment XIV	6, 7, 13, 20, 23

Other Authorities Cited

23 Brooklyn L. Rev. 185	25
44 Cal. L. Rev. 775, 777	25
70 Harv. L. Rev. 1428	25
55 Mich. L. Rev. 601, 602	25
27 St. Johns L. Rev. 93 (1952)	25
3 St. Louis U. L. Jour. 265	25
3 U.C.L.A. L. Rev. 387, 389, 390, 391	22, 23, 25
53 W. Va. L. Rev. 301	25

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OCTOBER TERM, 1958

No.

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Appellant,

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CITY OF AZUSA, a Municipal Corporation,

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APPEAL FROM THE DISTRICT COURT OF APPEAL,
STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

STATEMENT AS TO JURISDICTION

This is an appeal from the judgment of the District Court of Appeal of the State of California, Second Appellate District, dated October 3, 1958, which holds constitutional a Zoning Ordinance prohibiting churches within over 95 per cent of the City by exclusion from certain residential areas. This jurisdictional statement is submitted to show that this Court has jurisdiction of this appeal and that the questions presented are substantial.

OPINION

The opinion of the District Court of Appeal is reported. (*Minney* v. *City of Azusa,* 164 A. C. A. 16, 330 P. 2d 255

(Oct. 3, 1958)) [Op. 1-29][1] It is printed separately and accompanies this statement. It is marked: "Opinion of District Court of Appeal Accompanying Jurisdictional Statement."

JURISDICTION

This case involves a petition for writ of mandate and for other relief filed in the Superior Court of Los Angeles County. It concerns the invalidity of a Zoning Ordinance of the City of Azusa and the action of the City Council, taken under the Ordinance, denying a permit to build a church in the R-1 district, which is not exclusively residential but has in it many other public and non-residential uses, in addition to single homes. The judgment of the Superior Court of Los Angeles County denying all relief prayed for by appellant through dismissal of the amended petition on demurrer was affirmed by the District Court of Appeal on October 3, 1958. [Tr. 110, 156][2] The judgment is Appendix A to this statement, *infra*, at page 27. A petition for hearing was duly filed in the Supreme Court of California. [Tr. 110, 157] It was denied on December 1, 1958, by the Supreme Court of California. [Tr. 110, 242] The order denying hearing is Appendix B to this statement, *infra*, at page 28. The judgment of the District Court of Appeal became final on December 1, 1958. The notice of appeal to this Court was timely filed in the District Court of Appeal on February 24, 1958. (*American Railway Express Co.* v. *Levee*, 263 U. S. 19, 20-21 (1923)) Jurisdiction of this Court to hear and to decide this appeal is granted by 28 U. S. C. §1257 (2).--*Stratton* v. *Stratton*, 239 U. S. 55 (1915); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347

[1] Figures appearing herein within brackets preceded by "Op." refer to pages of the separately bound appendix to this petition for hearing wherein the opinion of the District Court of Appeal, annexed to this petition by reference, is printed in full.

[2] Figures appearing herein within brackets preceded by "Tr." refer to pages of the transcript of the record prepared by the Clerk of the District Court of Appeal and filed in the office of the Clerk of this Court.

U. S. 157, 160 (1954); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Jamison* v. *Texas*, 318 U. S. 413 (1943).

ORDINANCE INVOLVED

The proceedings in the Planning Commission and the City Council of the City of Azusa were had by appellant under the variance provisions of the original Zoning Ordinance of Azusa, known as Ordinance 409. The pertinent parts of this Ordinance were pleaded word for word in the amended petition, which is contained in the transcript. [Tr. 25-29] The green-covered appendix to appellant's opening brief in the District Court of Appeal, which has been filed in this Court and accompanies this statement, also shows those parts of the Ordinance. [App. 408][3]

The application for variance must be in writing and addressed to the Planning Commission, according to Section 19.3 of Article XIX, Ordinance No. 409. [Tr. 58; App. 5] The information to be put in the application is specified in Section 19.4 of Article XIX. [Tr. 58-59; App. 5-6] Provision is made for investigation followed by a hearing upon actual notice to certain property owners and notice by publication. [Tr. 59-60; App. 6-7] Provision for the recommendation by the Planning Commission to the City Council to either grant or deny a variance is provided for in Section 19-7 of Article XIX. [Tr. 60; App. 7-8] The City Council may either affirm the action of the Planning Commission or reverse or modify the Planning Commission, according to Section 19.8. [Tr. 60-61; App. 7-8]

Section 3.2 of an amendment to Ordinance No. 409, known as Ordinance No. 455, provides, among other things, as follows:

[3] Figures appearing herein preceded by "App." refer to pages of the green-backed printed appendix to the brief filed by appellant in the District Court of Appeal which contains all pertinent and material exhibits attached to the second amended petition for writ of mandate and other relief. Nine copies of this green-covered appendix have been filed with the Clerk of this Court for the use of the Justices.

> The boundaries of such zones are shown upon the Zoning Map adopted by this ordinance, or amendments hereto, and are hereby adopted and approved . . .

Originally the Ordinance provided for churches in the R-3 zone, according to Section 7.1 of Ordinance 441, amending Ordinance No. 409. [Tr. 61; App. 8] Ordinance No. 455 amending Ordinance No. 409 later specifically prohibited churches in the R-1 zone. [Tr. 62-63; App. 10-11] Uses permitted in the R-1 zone are stipulated in Section 5.1 of Ordinance No. 455, amending Ordinance No. 409. Section 5.1 reads as follows:

> Section 5.1. Uses Permitted.
>
> (a) A one-family dwelling of a permanent character, placed in a permanent location and used by but one family;
>
> (b) Agriculture and horticulture, flower and vegetable gardening, nurseries and greenhouses used only for purposes of propagation and culture and not including any sale at retail from the premises nor any signs or displays;
>
> (c) Accessory building, provided there is a main building on the premises:
>
> (1) Private recreational facilities;
>
> (2) Private lath house, greenhouse, or serivce yard;
>
> (3) Private tool shed or workshop;
>
> (4) Servants' quarters, provided that no kitchen or kitchen facilities shall be included in any such accessory building;
>
> (d) Libraries, museums, parks, playgrounds, public schools, and community buildings owned and controlled by the municipality or school district; water wells, and appurtenant facilities owned and operated by a public or quasi-public agency, if approved by resolution of record of both the Commission and City Council, and subject to such conditions as may be deemed proper by the City Council;

(e) Signs appurtenant to auxiliary uses permitted herein, providing they do not exceed three (3) square feet and are attached directly to the building;

(f) Signs advertising the premises for sale or for rent shall be located not nearer to the adjoining premises than ten (10) feet or nearer to the street line than five (5) feet, provided the sign shall not exceed five (5) square feet and provided there shall be not more than one sign on each ten (10) feet of frontage on a public street;

(g) A customary home occupation carried on in a dwelling, studio, or apartment, and carried on only by the members of the household of the person who occupies such dwelling, studio, or apartment, or his or her private residence, provided no window or other display or sign is used to advertise such occupation;

(h) The renting of not more than four (4) rooms to not more than eight (8) roomers and/or the providing of table board to not more than eight (8) boarders in a dwelling or apartment occupied as a private residence;

(i) Recreation and service buildings in a public park or public playground." [Tr. 63-64; App. 10-11]

Ordinance No. 441, amending Ordinance No. 409, by Sections 9.3 and 12.2 also provides for off-street parking on one-third of the lot used for assembly purposes. [Tr. 61-62; App. 8-9]

CONSTITUTIONAL PROVISIONS INVOKED

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the Government for a redress of grievances."

Section one of the Fourteenth Amendment to the United States Constitution provides:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

I.

Whether the Ordinance and amendments thereto are void on their face because they scheme a classification that bears no reasonable relationship to the police power and they exclude from over 90 percent of the City of Azusa, which is not exclusively a residential city, all churches, limiting them to the industrial areas and undesirable places in the city, thus constituting a denial of freedom of worship and religion contrary to the First Amendment and the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

II.

Whether the Ordinance and the amendment thereto that allows other types of public and semipublic buildings in the area while prohibiting churches, which are public or semipublic buildings, schemes a discrimination between churches and such buildings so as to deny equal protection of the laws on the face of the Ordinance and as construed and applied contrary to the equal protection of the laws clause of the Fourteenth Amendment to the United States Constitution.

III.

Whether the denial of a permit when there were other churches that have been permitted by the City of Azusa in the R-1 zone, constitutes an enforcement of the Ordinance in a manner that discriminates unlawfully against the appellant and denies him his constitutional rights, making the Ordinance unconstitutional because, as construed and applied it is contrary to the equal protection clause of the Fourteenth Amendment and the First Amendment to the Constitution of the United States.

IV.

The Ordinance and amendments thereto, as construed and applied to the facts of this case by the denial of the variance, constitute a denial of freedom of religion, freedom of worship and freedom of assembly contrary to the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Nature of Action

This case involves an appeal from a final judgment dated April 22, 1957, denying appellant's petition for writ of mandate, certiorari, declaratory judgment and other relief prayed for, which was entered by the Superior Court of Los Angeles County. [Tr. 97-98] The appeal to the District Court of Appeal was taken on May 9, 1957, within 60 days from the date of said judgment. [Tr. 99] Appellant sought by his petition to compel the issuance of a conditional use permit (called a variance in the ordinance in question) to build a church in the City of Azusa, pursuant to the provisions of basic Ordinance No. 409 and amendments thereto, authorizing churches in the area. [Tr. 53-87; App. 1-30] In response to the second amended petition for writ of mandate and other relief the appellee demurred, which demurrer was sustained, denying all relief prayed

for. The District Court of Appeal on October 3, 1958, affirmed with an opinion. [Op. 1-29]

Summary of the Material Facts

Appellant is a resident of the City of Azusa, Los Angeles County, and is the presiding minister of the Azusa Congregation of Jehovah's Witnesses. [Tr. 53; App. 1] This congregation was formerly unincorporated but, after the property in question was acquired, it was incorporated. [Tr. 53; App. 1] The purposes of the congregation are to preach the gospel of God's Kingdom and morally and mentally improve men and women. The corporation is authorized to use all lawful means deemed expedient to carry out the religious purposes of the corporation. [Tr. 54; App. 2-3]

The congregation has jurisdiction over a portion of Los Angeles County, including the City of Azusa. [App. 1, 23-24] Located in such area are a large number of persons who are interested in the religious beliefs of Jehovah's Witnesses and who desire to attend their congregational meetings in a place of public worship. [App. 23-24] The congregation of Jehovah's Witnesses in the City of Azusa has outgrown its present meeting place, which is entirely inadequate and undesirable. Because of this compelling need for a new place of worship the congregation authorized appellant to purchase the real property in question as trustee for the congregation. [Tr. 54-55; App. 2, 23-24]

The property was purchased by deed on November 1, 1954, by appellant who has ever since held it as trustee for the congregation. [Tr. 54-55; App. 2] A legal description of the property appears in the record. [Tr. 55-56; App. 3]

The City of Azusa is a municipal corporation having zoning ordinances, a Planning Commission and a City Council. [Tr. 55; App. 2-3] All of the pertinent portions of the Ordinances and amendments thereto are set forth in the record. [Tr. 56-65; App. 4-11] The Ordinances were attached also to the original petition as an exhibit. [Tr. 17] They are incorporated into and made a part of the second

amended petition by reference [Tr. 80; App. 25] The basic Ordinance provides for a petition for a variance. [Tr. 56-57; App. 4] The conditions for the granting of a variance are set forth in Section 19.2 of Article XIX of Ordinance No. 409. [App. 4-5] To obtain a variance it is necessary to show special circumstances that do not apply to other property, that it is necessary to do substantial justice and avoid hardship and that it will not result in material damage or prejudice to other property in the vicinity or be detrimental to the public health, safety or welfare. [Tr. 57; App. 4-5]

Ever since the enactment of Ordinance No. 409 and the amendments thereto the City of Azusa has never in the administration of such zoning law restricted the R-1 zone to the uses specified in the ordinances above quoted and has never enforced the provision of the Ordinances confining churches to the R-3 zone and excluding them from the R-1 and R-2 zones. [Tr. 64-65; App. 10-12] At all times the City of Azusa has administered the law so as to permit churches in the R-1 zone by the granting of many variances. [Tr. 65; App. 11-12] Variances were granted on September 28, 1949, to the Concordia Lutheran Church; on August 31, 1950, to the First Christian Church; on May 10, 1951, to the Church of Christ; on August 29, 1951, to the Church of the Nazarene and on January 7, 1954, to the Emanuel Baptist Church. [Tr. 65-67; App. 12-13]

The variance granted to the Emanuel Baptist Church by the City of Azusa was on an R-1 lot located immediately to the south of appellant's lot and the circumstances surrounding the granting of such variance were identical to those in this case. [Tr. 65-66; App. 12] The variance granted to the Emanuel Baptist Church lapsed and was later not exercised by the church. [Tr. 75; App. 20-21]

Ordinance No. 409 excludes churches from the R-2 and M-2 zones, as well as the R-1 zone. [Tr. 77-78; App. 23-24] These zones from which churches have been excluded include over 90 percent of the entire area of the City of Azusa. [Tr. 77-78; App. 23-24] The only available property for

churches in these zones is located adjacent to industrial uses and otherwise undesirable places for churches. [Tr. 77-78; App. 23] The practical effect of the ordinances as written excludes churches from over 95 percent of the suitable areas of the City of Azusa for building of churches. [Tr. 77-78; App. 23-24]

The ordinances as administered, however, have not been enforced so as to exclude churches from the R-1, R-2 and M-2 zones but on the contrary the variance provisions of the ordinances have been administered by the City of Azusa so as to use the same as special use permits for churches in the R-1 zone and other zones. [Tr. 65; App. 11-12]

Appellant during August of 1954 filed a written application using the printed forms of the Planning Commission of the City of Azusa for a variance. This application "complied in every respect with the law as then written and administered." [Tr. 67; App. 14] Notice was given and investigation was made. Thereafter on August 11, 1954, a hearing was had. [Tr. 68; App. 14] A copy of the transcript of the hearing before the Planning Commission on August 11, 1954, is attached to the second amended petition. [Tr. 69; App. 15, 31] The Planning Commission recommended against the granting of the variance, as appears in said transcript. [Tr. 69; App. 15] The matter came on for hearing before the City Council on September 7, 1954. The City Council affirmed the denial of the special use permit or variance and accepted the recommendation of the Planning Commission. [Tr. 69-70; App. 15-16] The reason for the affirmance was due "to the number of protests filed with the Council by people in the immediate vicinity." [Tr. 70; App. 16]

The application was renewed with the City Council. It was supported by a lengthy written document prepared by appellant as a verified supplement to the first application. This document is Exhibit C to the appellant's first amended petition, which is incorporated by reference in the second amended petition. [Tr. 70-71; App. 17, 52-82] The supple-

mental application was heard by the Planning Commission on February 2, 1955. [Tr. 71; App. 17] The transcript of that hearing is attached to the second amended petition as Exhibit B. [Tr. 71: App. 17, 35-47]

The Planning Commission on February 16, 1955, recommended against the granting of the application. A copy of that recommendation to the City Council is set forth as Exhibit C to appellant's second amended petition. [Tr. 71; App. 17, 47-49]

The City Council five days later, on February 21, 1955, sustained the action of the Planning Commission and accepted the recommendation that appellant be denied the permit to build the church and the variance. The minutes of the City Council's action are set forth in the record. [Tr. 73-74; App. 19-20]

The undisputed evidence appearing in (1) the written application for variance, (2) the verified supplement, (3) the transcript of the hearing of August 11, 1954, before the Planning Commission and (4) the transcript of the hearing before the City Council on February 2, 1955, showed that appellant was entitled as a matter of law to the granting of the permit to build a church or the variance. [Tr. 71, 72, 87; App. 49-52, 52-89, 31-35, 35-47]

The facts established that appellant was the owner of the property and trustee for the congregation, as well as the presiding minister. [App. 52-53] It was shown that the property was desired to be used as a church meeting place. The record showed a beautifully planned building conforming to the ordinances in all respects as to location, size, backset and off-street parking. [App. 53, 60-64] The proof showed that the appellant and the congregation represented by him were fully able to finance the building. [App. 60-64] The meetings of the church were shown to be orderly and not noisy and would not interfere with the use of other property in the area. [App. 67-68, 70, 82-87] It was made to appear that the building would be equal to or higher in standard in comparison with other buildings in the commu-

nity, with very pleasing architecture. [App. 72-73] It was shown that there would be no congestion of traffic and that there would be few cars. [App. 73-74] Appellant produced pictures of the entire neighborhood and of the site where the building was proposed. [App. 79]

The objections of the neighbors were answered by the appellant before the Planning Commission. [App. 61-64, 73, 74-76] The record before the Planning Commission also showed the granting of permits to other churches in the R-1 zone under circumstances identical to those surrounding the application on the property of the appellant. [App. 70-71, 71-72, 73, 77, 78] It was stated to the Planning Commission that the granting of permits to other churches and denying the permit to the appellant constituted a denial of equal protection of the laws and was also arbitrary and capricious. [App. 70, 70-71, 71-72, 73] The evidence also showed that the congregation represented by appellant would be irreparably injured and harmed if it were not permitted to build a church in the R-1 zone as other churches had been allowed to do. [App. 67]

It was alleged that the action of the Planning Commission and the City Council of the City of Azusa was arbitrary and capricious and based upon prejudice and objections of neighbors and there was no evidence of any kind of injury to the neighborhood, all of which resulted in a denial of constitutional rights. [Tr. 76-77; App. 21-23] It was further alleged that the ordinance on its face was unreasonable in that it excluded churches from 95 percent of the suitable places in the City of Azusa and limited them to places adjacent to industries and the railroads. [Tr. 76-78; App. 21-24] It was further alleged that the denial of the permit or variance constituted a denial of a place of religious assembly to the congregation represented by appellant in the City of Azusa which would constitute a denial of freedom of worship, religion and assembly to the entire congregation contrary to the constitution. [Tr. 78; App. 23]

How Federal Questions Raised and Determined

In the second amended petition for writ of mandate that requested other relief the appellant alleged specifically in paragraphs XXVII to XXVIII that the original Ordinance and the amended Ordinance, in the sections here complained about, both on their face and as construed and applied were discriminatory and in violation of the First and Fourteenth Amendments to the Constitution of the United States and in each of those paragraphs specified each of the questions presented upon this appeal and as stated above. [Tr. 76-80, 84-85; App. 22-26, 27-28] The trial court dismissed the petition upon a demurrer. [Tr. 97]

Each question under the federal Constitution presented upon this appeal was duly presented to the District Court of Appeal and each such question was considered and passed upon by that court adversely to the appellant. [Tr. 112-156; Op. 1-29] In a petition for hearing presented to the Supreme Court of California in the time required by law the appellant specifically presented to that court each of the above stated questions. [Tr. 157-202] That court on consideration of each of said federal questions denied a hearing in that court. [Tr. 242]

It is plain that each federal question here presented, therefore, was properly and timely raised and passed upon by the trial court, by the District Court of Appeal and by the Supreme Court of California. This Court must consequently find that each question presented is properly involved and requires decision by this Court.

ALL QUESTIONS RAISED ARE SUBSTANTIAL

I.

Exclusion of Churches While Allowing Other Public Buildings

The holding of the District Court of Appeal that there was no discrimination between the classification, excluding

churches and allowing other public buildings, in the Ordinance presents a conflict of decision with *Niemotko* v. *Maryland,* 340 U. S. 268 (1951); *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886) and *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942). This conflict shows a substantial question so as to make necessary a hearing in this Court by noting jurisdiction in order to secure uniformity of decision.

Ordinance No. 409, as amended by Ordinance No. 455, does not create an exclusively residential zone. It merely limits uses permitted in the residential zones to one and two family dwellings, agricultural uses and public buildings, such as libraries, museums, parks, playgrounds, public schools and community buildings. Churches and parochial schools which are also public buildings are prohibited in the zones but are restricted to the R-3 or multiple family zone and the R-4 or apartment house zone which constitute less than ten percent of the City of Azusa. [Op. 2]

Churches are public or semipublic buildings. They are schools where religious instruction is given. While different from public or parochial schools, the difference is not substantial. The distinction is not sufficient to avoid unconstitutional discrimination in the ordinance. Churches, as places of public education in the field of religion, contribute to the public welfare and bear burdens that normally fall upon the government. The peculiar public nature of sectarian places of public worship has resulted in a state constitutional tax exemption. The tax exemption of such public places of public education in religion is justified on the ground that they are "a sure basis on which the fabric of civil society can rest, and without which it could not endure."—*Trustees of First M. E. Church South* v. *Atlanta,* 76 Ga. 181, 192 (1886).

The performance of public functions that normally fall on the government proves the close similarity with public buildings, schools and other community buildings. The similarity of churches to other public buildings is so close

that the distinction made by the court below is a distinction without a difference. The holding of the court below that the Ordinance did not discriminate by excluding churches from the various zones of Azusa is out of harmony with *Roman Cath. etc. Corp.* v. *City of Piedmont,* 45 Cal. 2d 325, 289 P. 2d 438 (1955).

The holding of the court below is based upon the assumption that, so long as churches are all excluded by the face of the Ordinance and thus all are treated alike by the Ordinance on its face, there has been no unconstitutional discrimination. The court below bases its entire approach upon the erroneous assumption that *Corporation of Presiding Bishop* v. *City of Porterville,* 90 Cal. App. 2d 656, 203 P. 2d 823 (1949), applies. The ordinance involved in that case created a strictly residential district. No public uses of any sort were permitted in the limited and restricted area of the city. The Ordinance did not create an exclusively residential area in this case.

The Ordinance involved here permits a multitude of other public uses. The entire basis of *Corporation of Presiding Bishop* v. *City of Porterville,* 90 Cal. App. 2d 656, 203 P. 2d 823 (1949), was that it was within the police power to restrict uses in a *limited* area of a city so that "peace and quiet" could be preserved in that area of the city. But the Ordinance here involved does not even purport to preserve "peace and quiet" of the residential areas. Public buildings and schools are permitted which attract large crowds resulting in a permissive destruction of "peace and quiet" in all residential areas of Azusa. There is located directly across the street from the property involved here a public school with a school playground and game field that attracts huge crowds, to the disquiet of the entire area.

It is submitted that the classification of one type of public building so as to permit it and exclude another public building that does not disturb the "peace and quiet" of the neighborhood any more than the one allowed, is a distinction without a difference in law. It is not a classification

that is based "upon some difference in the classes having a substantial relation to the purpose for which the legislation is designed" which in a zoning ordinance must be the "peace and quiet" of the neighborhood. Because of this obvious difference there is no similarity between this case and *Corporation of Presiding Bishop* v. *City of Porterville,* 90 Cal. App. 2d 656, 203 P. 2d 823 (1949), which was erroneously simulated to this case by the court below.

In the event that the Court does not find that any conflict exists between the decision of the court below and the other cases cited above, then it is submitted that jurisdiction should be noted because the question involved is of such great and wide public importance that it is necessary to settle the question by a decision of this Court.

II.

Exclusion of the Churches From Over Ninety Per Cent of City

There is also involved in this case another question of very great public importance that justifies this Court in noting jurisdiction. It is whether the Ordinance in question is unreasonable and void on its face because it schemed a discriminatory classification against churches through excluding them from the zones that are not exclusively residential constituting over 90 percent of the entire area of the City of Azusa. The Ordinance limits churches, according to its provisions and the zoning map made a part of the Ordinance, to apartment house zones, industrial areas and other undesirable places in the city. This legislative action of the City of Azusa constitutes a denial of freedom of worship and religion contrary to the First and Fourteenth Amendments to the United States Constitution.

The court below refused to indulge reasonable intendments in favor of the pleading demurred to by the City of Azusa. It also completely disregarded Section 3.2 of Ordinance No. 455 and the zoning map attached to and made a

part of the pleading. Both of these documents, attached to the petition demurred to, show on their face without contradiction that the zones from which churches are excluded in the City of Azusa constitute over 90 percent or approximately 95 percent of the entire area of the city.

The court below stated that the incorporated references are "the zoning ordinance and the map" and then added, contrary to such documents, "but they do not show the truth of the asserted facts." [Op. 14] In the concluding part of the opinion this statement defying the documentary evidence attached to the petition demurred to is made again. The court below said: "The ordinance and zoning map do not support the allegation—not without the aid of oral explanation and application to the city's entire area." [Op. 26] These erroneous holdings of the court below are based upon the illegal conclusion that it was necessary that the appellant raise this objection to the ordinance at the hearings by oral testimony explaining to the Planning Commission and the City Council that the Ordinance and zoning map zoned churches out of over 90 percent of the city.

The law did not require appellant to give oral testimony at the hearings before the Planning Commission and the City Council to prove what the City Council could take judicial notice of, which was that churches are excluded from over 90 percent of the city by the Ordinance itself and the zoning map accompanying the Ordinance. These were made a part of the record of the hearings before the Planning Commission and the City Council. They established the fact of the exclusion *per se*. They were attached to and made part of the petition demurred to. It was wholly unnecessary to have oral testimony explaining or interpreting them to show the Council that the area from which churches are excluded constitutes over 90 percent of the area of the entire city. The two documents that were before the Council and which were attached to the petition were enough. They needed no support of oral testimony to the

Council, as held by the court below. The documents spoke for themselves.

It was not necessary to even offer them at the hearings before the Planning Commission or the City Council. These adminstrative bodies could take judicial notice of the zoning law that they were acting under, as well as the map made a part of the law by reference. It was time enough to rely upon these documents to prove the exclusion when they were attached to the petition demurred to.

It is submitted that the District Court of Appeal ignored the fact that in the declaratory judgment action it was unnecessary to show that the documents were challenged before the Council. The court below should have held that the pleadings and the record attached to the pleadings did in the declaratory judgment action sufficiently show that the ordinance, on its face and by reference to the zoning map, excluded churches from over 90 percent of the City of Azusa. This holding of the court below, that the record does not show an exclusion of churches from over 90 percent of the city, should not preclude this Court from considering this all-important question. The holding of the court below is in conflict with other decisions, holding that this Court deals with substance and not shadows and will cut through technicalities and examine the facts for itself in spite of a state court holding to the contrary. See *Fiske* v. *Kansas,* 274 U. S. 380, 385-386; *Norris* v. *Alabama,* 294 U. S. 587, 590; *Chambers* v. *Florida,* 209 U. S. 227, 228-229; *Ashcroft* v. *Tennessee,* 322 U. S. 143, 147-148 and *Craig* v. *Harvey,* 331 U. S. 367, 373-374.

The decision of the District Court of Appeal does not involve an inquiry "into the correctness of the facts stated in the opinion" as that term is used in Rule 29 (b) of the Rules of Appeal of California. The District Court of Appeal correctly stated the facts of existence of the Ordinance and the map attached to the petition demurred to. The error of the court below is an error of law based upon the erroneous assumption that the failure to have oral testimony at the

hearing before the City Council about the matter justified a conclusion that appellant failed to show in his pleadings that the Ordinance and the map exclude churches from over 90 percent of the area of the City of Azusa, when the Ordinance (Section 3. 2 of Ordinance No. 455) and the map on their face showed the exclusion to the extent of 95 percent of the City.

Neither this Court nor any court other than the court below has determined that the exclusion of churches from over 90 percent of the area of a city is not a denial of rights guaranteed by federal constitutions. The Supreme Court of Michigan has, however, decided that an ordinance excluding churches from even the greater part of a city does constitute a violation of constitutional rights of a church. See *Mooney* v. *Village of Orchard Lake*, 333 Mich. 389, 53 N. W. 2d 308, 309-310 (1952), where "although" *the ordinance appeared on its face* to allow churches and schools, under special permit only, in three zones comprising about *ten per cent* of the village's area while prohibiting them in the fourth zone containing the balance of the village, nevertheless, when applied to existing facts and circumstances, it served, as a practical matter, to exclude churches and schools from the village." (Italics added.) See *Congregation Temple Israel* v. *City of Creve Coeur*, 320 S. W. 2d 451, 454-45 (S. Ct. Mo., January 12, 1959, No. 46,597), where the court cites 14 high state court decisions holding "invalid zoning ordinances which have excluded churches or religious schools from residential districts."

It is submitted that this question is so substantial and of such wide public importance that this Court should note jurisdiction in order to determine it.

III.

Ordinance Grants Unlimited Discretion to City Council

There exists in this case another question that is of wide importance which requires the noting of jurisdiction for a

hearing in this case. It is whether the Ordinance in question granting unlimited and uncontrolled discretion in the City Council to deny the variance made the Ordinance unconstitutional because, as construed and applied to the facts of this case, it denied appellant of freedom of assembly and freedom of worship, contrary to the Constitution of California and the First and Fourteenth Amendments to the United States Constitution. See *Lovell* v. *City of Griffen*, 303 U. S. 444 (1938); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Saia* v. *New York*, 334 U. S. 558 (1948). The decision of the court below was that it did not. [Op. 27-28] This holding is in conflict with these decisions by the Supreme Court of the United States and for that reason also it is necessary for this Court to note jurisdiction and order a hearing in order to secure uniformity of decisions.

IV.

Discrimination Between Appellant and Other Religions

There exists in this case another question that provides reason why there should be a noting of jurisdiction and hearing in this Court. It is whether the action of the City Council of Azusa in granting five other variances to religious organizations under the Ordinance permitting them to build churches in the R-1 zone after the passing of the Ordinance, while denying the application of the appellant in the same circumstances, constitutes a denial of freedom of assembly and worship, contrary to the provisions of the state and federal constitutions guaranteeing equal protection of the laws. The court found that the action of the City Council did not constitute discrimination but was a fair and lawful administration of the zoning law. [Op. 19-21, 25-26] The decision of the court below is in conflict with *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953; *Danskin* v. *San Diego Unified School*

District, 28 Cal. 2d 536, 545, 171 P. 2d 885 (1946); *Underhill v. Board of Appeals of Town of Oyster Bay*, 273 App. Div. 788, 75 N. Y. Supp. 2d 327, 328 (1947) (affirmed, 297 N. Y. 937, 80 N. E. 2d 342).

This Court ought to note jurisdiction because of the substantial question involved as to the means employed by the court below in its opinion to reach a conclusion that no case of discrimination was shown by appellant. It was that because the Council had made five previous mistakes in granting church variances favoring other churches it gave no justification for the granting of the sixth variance to appellant contrary to law. The court below ignored that appellant challenged the entire legislative scheme of providing for variance as the means of having churches in the residential zones wrapped up in the subsequent administration of the variance provisions so as to convert the law into a conditional use permit for churches instead. It should be noted that all five of the other churches permitted by the Council were granted under the variance provisions of the Ordinance and, of the five the Council granted, three were in the R-1 residential district. The other two churches were allowed in other residential districts where churches were also prohibited except by variances.

The court below glossed over the undisputed evidence showing a discrimination in the administration of the variance provisions of the Ordinance insofar as they related to churches. The court below blandly held that there existed a presumption of regularity of administrative procedure by the council in the administration of the variance provisions. This holding ignored the fact that under the law of the land there exists a difference between cases involving freedom of religion and cases involving mere property rights without reference to civil rights. Where civil rights are involved in any case then there is no presumption of regularity of administrative proceedings and the burden shifts to the administrative agency to justify the deprivation of the fundamental personal rights of freedom of as-

sembly and religion. (*In re Porterfield*, 28 Cal. 2d 91, 112, 168 P. 2d 706 (1946); *Roman Cath. etc. Corp.* v. *City of Piedmont*, 45 Cal. 2d 325, 289 P. 2d 438 (1955); *Pittsford* v. *City of Los Angeles*, 50 Cal. App. 2d 25, 32 122 P. 2d 535 (1942); *In re Mares*, 75 Cal. App. 2d 798, 806, 171 P. 2d 762 (1946); see also *State ex rel. Synod of Ohio* v. *Joseph*, 139 Ohio St. 229, 246-247, 39 N. E. 2d 515 (1942); *Thomas* v. *Collins*, 323 U. S. 516, 531 (1945); *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938); *Busey* v. *District of Columbia*, 138 F. 2d 592,595-596 (D. C. Cir. 1943); 3 U. C. L. A. Law Review 387, 389, 390.) The appellee in this case failed to meet the burden cast upon it by the cases above cited.

The court below allowed the erroneous application by it of the rule of presumption of regularity of administrative proceedings to blind it to the facts appearing in the record showing a disgraceful discrimination practiced by the City of Azusa against Jehovah's Witnesses. It showed they allowed all other churches to have permits to build in the residential areas issued to them by way of the variance law and at the same time denied appellant a permit to build a church in the same zoned areas.

It is submitted that because of the conflict between the holding of the court below and the decisions above cited it is necessary for this Court to note jurisdiction so as to secure uniformity of decision on this important question of law. In the event the Court finds no conflict, then the Court is respectfully requested to note jurisdiction because there is involved a substantial question of constitutional law of nation wide public importance.

V.

Court Erred In Resting Decision on Presumption of Constitutionality of Ordinance and City Council Action

There exists another reason why this Court should note jurisdiction. The decision of the court below, that there

existed no presumption of unconstitutionality of the administrative action in denying the application made by the appellant and in holding that the appellant had the burden of proof to satisfy all of the demands of the City Council in order to obtain a variance by showing an abuse of discretion, undue hardship and special circumstances, is in conflict with *In re Porterfield*, 28 Cal. 2d 91, 112, 168 P. 706 (1946); *Roman Cath. etc. Corp.* v. *City of Piedmont*, 45 Cal. 2d 325, 333, 289 P. 2d 438 (1955); *Busey* v. *District of Columbia*, 138 F. 2d 592, 595-596 (D.C. Cir. 1943); *Thomas* v. *Collins*, 323 U. S. 516, 531 (1945); *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938); *State ex rel. Synod of Ohio* v. *Joseph*, 139 Ohio St. 229, 246-247, 39 N. E. 2d 515 (1942). See also 3 U. C. L. A. Law Rev. 387, 389, 390.

It is respectfully submitted that the holding of the court below on these issues conflicts with the decisions above cited. This constitutes a ground for noting jurisdiction by this Court since it is necessary to secure uniformity of decisions.

VI.

Reasons of City Council Insufficient to Deny Right Guaranteed by First Amendment

The holding of the court below approving the findings of the City Council, that the application should be denied because of reasons of traffic congestion, noise, depreciation of property values and other such reasons, is a holding that relies upon unsubstantial and insufficient reasons of police power that are inadequate to support a denial of rights guaranteed by the First Amendment to the Constitution of the United States. The decision of the court below ignores the distinction between cases involving rights of freedom of assembly and freedom of worship guaranteed by the First and Fourteenth Amendments to the United States Constitution and mere property rights guaranteed by the Fourteenth Amendment. The holding of the court

below on this point is in conflict with *Terminiello* v. *City of Chicago*, 337 U. S. 1, 4 (1949); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943); *Schneider* v. *New Jersey*, 308 U. S. 147, 161 (1939); *Thomas* v. *Collins*, 323 U. S. 516, 529-530 (1945); *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96 (1940); *Martin* v. *City of Struthers*, 319 U. S. 141, 151-152 (1943); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115 (1943); *Follett* v. *Town of McCormick*, 321 U. S. 573, 575 (1944); *Pittsford* v. *City of Los Angeles* 50 Cal. App. 2d 25, 32, 122 P. 2d 535 (1942); *In re Mares*, 75 Cal. App. 2d 798, 806, 171 P. 2d 762 (1946).

It may be argued that this case does not involve rights of religion and assembly guaranteed by the constitutions. The court below seemed to think that the case involved only property rights and that appellant stood on no higher estate. But the assumption of the court below ignores the following fundamentals: there can be no worship without assembly; there can be no assembly for worship without a place; there can be no place of assembly unless it can be used for assembly for public worship. The Constitution, therefore, guarantees a right to own and use real estate for a place of worship. If the place of assembly is denied under the pretext of regulation by a zoning law that confers arbitrary and capricious powers to deny the right to use a place of assembly guaranteed by the Constitution then there is a denial of freedom of worship.

There can be no distinction between worship in the conventional manner in a place of assembly and worship by means of distribution of religious literature. The cases of *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Schneider* v. *New Jersey*, 308 U. S. 147, 161-162, 163 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Largent* v. *Texas*, 318 U. S. 418 (1943); and *Saia* v. *New York*, 334 U. S. 558 (1948), are, therefore, applicable here. The decision of the court below is in conflict with such decisions, as also it is with the decisions cited above under this point holding that insubstantial reasons justifying laws abridging the rights

of property are not sufficient to support a denial of civil liberties.

It is respectfully submitted that the holding of the court below on this issue conflicts with the decisions above cited. This constitutes a ground for noting jurisdiction by this Court since it is necessary to secure uniformity of decision.

The case of *Corporation of Presiding Bishop* v. *City of Porterville*, 90 Cal. App 2d 656, 203 P. 2d 823 (1949), appeal dismissed 338 U. S. 805 (1949), commented upon in *American Communications Association* v. *Douds*, 339 U. S. 382, 397-398 (1950), relied on by the court below, is not in point. [Tr. 117-118, 209-210; Op. 5] The case did not involved a residential district where many other public uses and other nonresidential uses were allowed, as here, but part of the Ordinance was limited only to a small portion of the city. It prohibited churches in only one small residential area of the city which was confined exclusively to single-family dwellings and no public and non-residential use was allowed, as in this case. The case here where churches are excluded from 95 per cent of the city is more like *Mooney* v. *Village of Orchard Lake*, 333 Mich. 389, 53 N. W. 2d 308 (1952). Compare *Roman Catholic Welfare Corp.* v. *City of Piedmont*, 45 Cal. 2d 325, 289 P. 2d 438 (1955). See also 70 Harv. L. Rev. 1428; 44 Cal. L. Rev. 775, 777; 3 U. C. L. A. L. Rev. 387, 391; 27 St. Johns L. Rev. 93; 55 Mich. L. Rev. 601, 602; 23 Brooklyn L. Rev. 185; 53 W. Va. L. Rev. 301; and 3 St. Louis U. L. Jour. 265.

The court below quotes from *American Communications Association* v. *Douds*, 339 U. S. 382, 397-398 (1950), where the Court cites *Corporation of Presiding Bishop* v. *City of Porterville*, 90 Cal. App. 2d 656, 203 P. 2d 823 (1949). [Tr. 117-118, 209-210; Op. 5] There the Court said that the Ordinance that carved out a very small part of the city and made it exclusively residential (without any public uses) was a "relatively small" infringement upon freedom of religion. Here the entire R-1 residential zone is not exclusively residential but is a zone where churches are permitted

along with other public uses. Appellant has been barred from this "appropriate place" for churches (*Schneider* v. *New Jersey*, 308 U. S. 147, 167) by the enforcement of the vague and indefinite provisions of the various sections of the Ordinance which applies to 95 per cent of the city. Such provisions relied upon by the City Council to bar the appellant from having a church in the R-1 zone cannot, by any stretch of the imagination, be said to be "relatively small" or simulated to the small exclusively residential part of the City of Porterville, California.

The statement by this Court in *American Communications Association* v. *Douds*, 339 U. S. 382, 397-398 (1950), about the dismissal for want of substantial question in *Corporation of Presiding Bishop* v. *City of Porterville*, 90 Cal. App 2d 656, 203 P. 2d 823 (1949) appeal dismissed 338 U. S. 805 (1949), is not applicable in this case for the reason that it is distinguishable as stated above.

CONCLUSION

For the reasons above stated this Court should conclude that the questions involved are substantial and of wide public importance so as to warrant the noting of jurisdiction, which should be done by this Court. Then the case should be set down for hearing and the questions resolved in due course of time and procedure.

Respectfully submitted,

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Counsel for Appellant

March, 1959

APPENDIX A

Judgment of District Court of Appeal

Judgment affirmed.

J. ASHBURN

We concur.

P. J. FOX

J. HERNDON

[Tr. 156]

APPENDIX B

Order Denying Hearing After Judgment by District Court of Appeal

Order Due
December 2, 1958

2nd District, Division 2, Civ. N. 22896

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

MINNEY
v.
CITY OF AZUSA

Appellant's petition for hearing DENIED.

Carter, J.
and
Traynor, J. are of the opinion that the petition should be granted.

GIBSON
Chief Justice

FILED
DEC 1, 1958

[Tr. 242]

FILE COPY

OFFICE SUPREME COURT, U.S.
FILED
MAR 13 1959
JAMES R. BROWNING, CLERK

Supreme Court of the United States

OCTOBER TERM, 1958

No. 768

ROBERT F. MINNEY,

Appellant,

vs.

CITY OF AZUSA, a Municipal Corporation,

Appellee.

APPEAL FROM THE DISTRICT COURT OF APPEAL,
STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

OPINION OF DISTRICT COURT OF APPEAL ACCOMPANYING JURISDICTIONAL STATEMENT

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Appellant

IN THE
DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

ROBERT F. MINNEY,
Plaintiff and Appellant,

vs.

CITY OF AZUSA, a municipal corporation,
Defendant and Respondent.

Civil No. 22896
FILED
OCT 3 - 1958

[Reported: 164 A.C.A. 16, 330 P. 2d 255]

Appeal from a judgment of the Superior Court of Los Angeles County. Kenneth C. Newell, Judge. Affirmed.

For Appellant: Birnbaum and Hemmerling; Hayden C. Covington.

For Respondent: Tscharner & Tscharner.

Reverend Robert F. Minney, acting as Congregation Servant and presiding minister of Azusa Congregation of Jehovah's Witnesses (a religious organization), appeals from a judgment which upholds the denial of a variance sought by him under the city's Comprehensive Zoning Ordinance for the purpose of constructing within the R-1 or residential zone a church or "Kingdom Hall" for use of said congregation. The basic claim is denial of

religious liberty and violation of the First and Fourteenth Amendments to the Constitution of the United States.

The city of Azusa is a municipal corporation organized in 1898 under the General Municipal Act of 1883, and has a population of about 15,000. Its Comprehensive Zoning Ordinance No. 409 was passed in 1949 and defines numerous zones ranging from single family residential (R-1) to general manufacturing (M-2). It was amended before plaintiff's application for a variance was made, first by Ordinance No. 441 on January 7, 1952, and then by Ordinance No. 455 on August 4, 1952. As thus amended the ordinance provided at the time of plaintiff's application (in August, 1954) that the uses permitted in the R-1 or single family residence zone should be "(a) A one-family dwelling of a permanent character, placed in a permanent location and used by but one family; (b) Agriculture and horticulture, flower and vegetable gardening, nurseries and greenhouses used only for purposes of propagation and culture and not including any sale at retail from the premises nor any signs or displays; . . . (d) Libraries, museums, parks, playgrounds, public schools, and community buildings owned and controlled by the municipality or school district. . . ." (Quotations are from §5.1 of Ordinance No. 455.) Other portions of the section are not material to the present problem. Section 7.1, covering zone R-3 or multiple family residence zones, authorizes "(a) Any use permitted in Zones R-1 and R-2. (b) Any flat building, apartment house, or bungalow court, together with the out-buildings necessary to such use, located on the same lot or parcel of land. (c) Churches and/or parochial schools." (Quotation from Ordinance No. 441.) Section 8.1 (b) of Ordinance No. 409 (not later amended) also permits churches in the R-4 or apartment house zone.

Appellant brought this action attacking the ordinance as discriminatory on its face and in its administrative

application to his congregation through denial of a variance which would permit erection of a church in the R-1 zone. His second amended complaint, to which a demurrer was sustained without leave to amend, seeks mandamus, injunction, declaratory relief, certiorari and prohibition. Having been denied any relief he appeals from the judgment.

The pleading presents first the fundamental issue whether a zoning ordinance can lawfully exclude churches from a residential district. This question is settled in the affirmative so far as California law is concerned. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *City of Porterville*, 90 Cal. App. 2d 656, arose under the zoning ordinance of the city of Porterville which established an R-1 zone wherein buildings were restricted to single family residences. Churches were included in the R-4 or "unlimited residence" zone. The Mormon church, through its Presiding Bishop, sought mandamus to compel the city authorities to issue a permit for construction of a church upon property owned by plaintiff within the R-1 zone. Demurrer having been sustained without leave to amend, plaintiff appealed from the judgment. "Plaintiff's contention is that the zoning ordinance as applied to plaintiff to prevent its construction of a church for religious worship upon its property is invalid because, as so applied, it bears no substantial relation to the public health, safety, morals and general welfare and thus is beyond the police power of the state to enact, and further, because the application of the ordinance to petitioner results in a restriction of religious worship in the absence of any grave or imminent danger justifying such a restriction." (P. 658.) The court said, at pages 659-660: "A single family residence may be much more desirable when not in an apartment house neighborhood or adjacent to a public building such as a church. The municipal legislative body may require that church buildings be erected to conform to

health and safety regulations as provided in its building code and we see no reason to hold that churches may be erected in a single family residential area when a duplex, triplex, or other multiple dwelling can lawfully be excluded therefrom. The provision in the ordinance for a single family residential area affords an opportunity and inducement for the acquisition and occupation of private homes where the owners thereof may live in comparative peace, comfort and quiet. Such a zoning regulation bears a substantial relation to the public health, safety, morals and general welfare because it tends to promote and perpetuate the American home and protect its civic and social values.

"We find no merit in plaintiff's contention that the application of the ordinance to the plaintiff results in an unwarranted restriction of religious worship. . . . The denial of a building permit did not prohibit anyone from religious worship and there is nothing in the record before us to indicate that the church building could not be erected if located in the area zoned for that purpose.

"The petition fails to state a cause of action in that the facts alleged do not show that the ordinance in question is unreasonable and void as applied to plaintiff." At 661: "The burden is upon the plaintiff to allege and prove physical facts from which the court could conclude as a matter of law that the ordinance was unreasonable and invalid. (*Wilkins* v. *City of San Bernardino, supra*, p. 338.)

"In enacting zoning ordinances, the municipality performs a legislative function and every intendment is in favor of the validity of such ordinances. (*Jardine* v. *City of Pasadena*, 199 Cal. 64, 72-73 [248 P. 225, 48 A.L.R. 509].) It is presumed that the enactment as a whole is justified under the police power and adapted to promote the public health, safety, morals, and general welfare. (*Lockard* v. *City of Los Angeles*, 33 Cal. 2d 453, 460 [202 P. 2d 38].)

"There is reasonable justification for the action of the defendant city in prescribing the buildings which may be erected and constructed in the zone established for single

family residences and in such cases the wisdom of the prohibitions and restrictions is a matter for legislative determination. (*Lockard* v. *City of Los Angeles, supra*, p. 461.)" Our Supreme Court denied a hearing. The United States Supreme Court dismissed an appeal from the judgment "for want of a substantial Federal question" (338 U. S. 805) and denied a rehearing (338 U. S. 939). It later explained the philosophy of the ruling as follows: "When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas. Corporaton of Presiding Bishop, C.J.C.L.D.S. v. Porterville, 338 U. S. 805, ante, 487, 70 S Ct. 78 (1949)." (*American Communications Asso.* v. *Douds*, 339 U. S. 382, 397.)

The Porterville decision was followed in *City of Chico* v. *First Ave. Baptist Church*, 108 Cal. App. 2d 297, 301, a case involving the validity of a zoning ordinance requiring the obtaining of a use permit before devoting to church uses property located in the residential zone. The Supreme Court recently recognized Porterville as good law, saying in *Roman Cath. etc. Corp.* v. *City of Piedmont*, 45 Cal. 2d 325, 334: "Respondents place reliance upon the case of *Corporation of Presiding Bishop* v. *City of Porterville*, 90 Cal. App. 2d 656 [203 P. 2d 823], in which it was held that by ordinance the city could prohibit all churches in a residential area. That case is distinguishable from the one under consideration. Here, only private schools are excluded—not *all* schools as were all churches in the Porterville case."

Although it did not follow the Porterville doctrine, the Supreme Court of Washington in *State* v. *City of Wenat-*

chee, 312 P. 2d 195, 197, made pertinent observations concerning the weight of authority and the California ruling: "Generally, zoning ordinances which wholly exclude churches in residential districts have been held to be unconstitutional. . . . However, in Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P. 2d 823, the California court expressed a view contrary to the prevailing weight of authority. The essence of the reasoning of the California Court seems to be that zoning legislation which prospectively treats all religious groups alike, i.e., prohibits prospectively all churches in certain zones, if otherwise reasonable, may be a valid and a proper non-discriminatory, non-arbitrary exercise of state police power. This viewpoint rejects the reasoning of the weight of authority that churches may be excluded or zoned out of particular areas only on the basis of traffic or other hazards substantially related to public health or safety. The viewpoint of the weight of authority may be an extreme one. It ignores the basic premise of modern day zoning legislation which emphasizes the best and most reasonable land utilization possible, considering the best interests of the entire community. It permits any church group, absent the factor of traffic hazards, substantially related to public health and safety, to acquire land and to establish a church, irrespective of other factors which may be of significant public interest, and normally considered and emphasized in present day community land use planning programs."

The Porterville case is but a recognition and application of the concept that there can be no absolutes even in the field of personal freedoms, and that this is and must be a nation of ordered liberties if the fundamental guarantees of the First and Fourteenth Amendments are to survive. Mr. Chief Justice Hughes thus stated the matter in *Cox v. New Hampshire*, 312 U. S. 569 (a case which holds that Jehovah's Witnesses were not entitled to conduct a street parade without first procuring the statutorily required

special license): "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend." (P. 574.) Also: "The argument as to freedom of worship is also beside the point. No interference with religious worship or the practice of religion in any proper sense is shown, but only the exercise of local control over the use of streets for parades and processions." (P. 578.)

In *Gospel Army* v. *City of Los Angeles*, 27 Cal. 2d 232, 242, the court said: "'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word of mouth or act their faith therein.' (*West Virginia* v. *Barnette*, 319 U. S. 624, 642 [63 S. Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674].) It does not follow, however, that religious organizations enjoy unlimited freedom in carrying on all activities related to their religious program." On page 243 it quoted a portion of the above passage from *Cox* v. *New Hampshire*, supra. The case upheld a city ordinance requiring plaintiff to procure a secondhand dealer's license to conduct its salvage activities through sale in a secondhand goods store operated by it; this notwithstanding that plaintiff was found to be "'engaged exclusively in the promulgation, by literature and word of mouth, of its religious beliefs, by and through its auxiliaries, and in the procuring of donations in the form of money and articles of value in the prosecution and furtherance of its religious activities.'" (P. 233.)

In *Cantwell* v. *Connecticut*, 310 U. S. 296 (upholding the right of Jehovah's Witnesses to solicit from door to door

without first procuring a license as required by statute), the court said: "No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guaranty. It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." (P. 304.) Effect was given to this idea of permissible regulation of "the times, the places, and the manner or soliciting upon its streets" by the ruling in *Rescue Army* v. *Municipal Court*, 28 Cal 2d 460. The Los Angeles Charities and Relief Ordinance in §44.09 (a) required persons soliciting contributions for charity by means of receptacles in certain specified public places to secure express written permission from the Board of Social Service Commissioners (P. 469). Upholding this requirement the court said, at page 470: "There can be no question, therefore, that a person is free to hold whatever belief his conscience dictates, but when he translates his belief into action he may be required to conform to reasonable regulations which are applicable to all persons and are designed to accomplish a permissible objective. (*Gospel Army* v. *City of Los Angeles, supra.*)" Explaining that reliance upon *Cantwell* v. *Connecticut, supra,* was misplaced, it further remarked: "It is clear, however, from what has been said before that the right to the permit required in subdivision (a) of section 44.09 does not depend upon a religious test. . . . As before stated, the authority of the board is limited to regulating the issuance of permits for the solicitation of funds in the designated publicly owned or controlled places *by means of receptacles* for the sole purpose of preventing fraudulent practices and protecting the safety and convenience of the public. 'The general reg-

ulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise.' (310 U. S. 304, 305.[1]) . . . We conclude, therefore, that the provisions of the ordinance underlying the charges against Murdock are constitutional, and that in the absence of admitted or proven facts showing that the ordinance is being unconstitutionally applied, the alternative writ must be discharged and the peremptory writ must be denied." (Pp. 472, 473.)

Murdock v. *Pennsylvania*, 319 U. S. 105, referring to *Cox* v. *New Hampshire, supra,* and *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, says: "But that merely illustrates that the rights with which we are dealing are not absolutes." (P. 110.) Also: "Jehovah's Witnesses are not 'above the law.' But the present ordinance is not directed to the problems with which the police power of the state is free to deal." (P. 116.)

"Although the central issue in determining the validity of an ordinance excluding churches from a zoned area would seem to be whether the restriction interferes with the first-amendment guarantee of freedom of religion as incorporated in the fourteenth, none of the decisions invalidating these ordinances has explicitly rested on this ground. Although the Supreme Court has been strict in its prohibition of prior restraints on freedom of religion or speech, it has held that reasonable regulations of time and place are valid. Whether a zoning ordinance restricting the location of churches is such a reasonable regulation should turn on whether the interference with the free exercise of religion is outweighed by the public interest in restriction. A highly relevant consideration would be the availability to

[1] The Cantwell case.

the church of alternative locations." (70 Harv. L. Rev. 1436.)

Appellant's briefs finally come to rest upon the proposition that churches are subject to zoning regulation so long as same are not discriminatory on their face or in their administration. "Appellant admits that churches must comply with the law. This is not gainsaid. But because churches must comply with regulatory, procedural provisions of the zoning law, this does not give unlimited discretion to the administrators so that they can violate the constitutional rights of churches.' "It is said on page 2 of the [respondent's] brief that appellant has a 'theory' that zoning laws, as applied to churches, are unconstitutional *per se*. This is not the contention of the appellant. It is the contention of the appellant that this particular zoning law, on its face and especially as enforced, is unconstitutional. . . . The statement in the middle of page 23 that churches are subject to reasonable zoning regulations is admitted."

Our discussion must proceed from this point upon the assumption that an ordinance which excludes churches from residence zones and in consequence classifies them in relation to other activities is valid unless it discriminates against churches upon its face or is so administered as to accomplish that result.

Appellant argues that the Azusa ordinance is discriminatory upon its face because churches are excluded from zone R-1 which is open not only to single family residences but also to agriculture, horticulture, flower and vegetable gardens, nurseries and greenhouses used only for purposes of propagation and not for sale at retail; also, libraries, museums, parks playgrounds, public schools and community buildings owned and controlled by the municipality or school district (Ordinance No. 455, §5.1). Churches are included in zone R-3 which also embraces flat buildings, apartment houses, bungalow courts and parochial schools (Ordinance No. 441, §7.1).

It being established law that churches can be excluded

legally from a residential zone and that they are subject to reasonable zoning regulations, appellant stands, with respect to this claim of unreasonable classification or discrimination on the face of the ordinance, in the same position as any other litigant who raises that issue. In other words, proposed use of the property for religious purposes does not give it *per se* a title to any particular zone; a church, like any other property owner, is to be considered on its merits as fitting into the general scheme of a comprehensive zoning, entitled to no preference and subject to no adverse discrimination.

The burden rests upon him who asserts invalidity of the zoning ordinance to show "such an abuse of discretion on the part of the zoning authorities as would justify the court in concluding as a matter of law that the ordinance is unduly oppressive and not reasonably necessary to promote the general welfare of the people of the community." (*Lockard* v. *City of Los Angeles*, 33 Cal. 2d 453, 467.) See, also, *Wilkins* v. *City of San Bernardino*, 29 Cal. 2d 332, 338; *Beverly Oil Co.* v. *City of Los Angeles*, 40 Cal. 2d 552, 559; *Acker* v. *Baldwin*, 18 Cal. 2d 341, 344-345; *Otis* v. *City of Los Angeles*, 52 Cal. App. 2d 605, 614-615. Every intendment favors a valid exercise of the police power in this respect. (Idem.) Any "zoning plan must be viewed as a whole and the court will not search out individual cases of discrimination or hardship." (*Acker* v. *Baldwin, supra*, 18 Cal. 2d 341, 345.) Effect of a particular zoning upon surrounding properties is to be considered by the zoning authorities (*Lockard* v. *City of Los Angeles, supra* p. 464; *Robinson* v. *City of Los Angeles*, 146 Cal. App. 2d 810, 816), as are existing conditions and probabilities of future developments in the area under consideration. (*Acker* v. *Baldwin, supra*, p. 346; *Lockard* v. *City of Los Angeles, supra*, p. 464.) All this adds up to an ultimate rule that the wisdom of the ordinance is not a matter for the courts unless there is apparent a manifestly unreasonable classification. (*Lockard* v. *City of Los Angeles, supra*, pp. 461-462;

McCarthy v. *City of Manhattan Beach*, 41 Cal. 2d 879, 886; *Schamm* v. *Board of Supervisors*, 140 Cal. App. 2d 874, 880; *Otis* v. *City of Los Angeles*, *supra*, pp. 605, 613-614.)

Though we might have included churches in the R-1 zone had we drafted the ordinance, that fact alone would not now justify interference with the results achieved by the public body charged with that duty. "The wisdom of the prohibitions and restriction is a matter for legislative determination, and even though a court may not agree with that determination, it will not substitute its judgment for that of the zoning authorities if there is any reasonable justification for their action." (*Lockard* v. *City of Los Angeles*, *supra*, 33 Cal. 433, 461.) "As stated in *Clemons* v. *City of Los Angeles*, 36 Cal. 2d 95 [222 P. 2d 439], a zoning ordinance enacted pursuant to a comprehensive plan of community development, 'when reasonable in object and not arbitrary in operation,' will be sustained as a proper exercise of the police power; every intendment is in favor of its validity, and a court will not, 'except in a clear case of oppressive and arbitrary limitation,' interfere with the legislative discretion; it is presumed to be adapted to promotion of the public health, safety, morals and general welfare; and though the court may differ with the zoning authorities as to the 'necessity or propriety' of the regulation, so long as it remains a 'question upon which reasonable minds might differ,' there will be no judicial interference with the municipality's determination of policy." (*McCarthy* v. *City of Manhattan Beach*, *supra*, 41 Cal. 2d 879, 885.)

That these principles are equally applicable to a claim of discrimination when raised by a religious society is attested by *Corp. Presiding Bishop* v. *City of Porterville*, *supra*, 90 Cal. 2d 656 (see language quoted above); also by *Roman Cath. etc. Corp.* v. *City of Piedmont*, *supra*, 45 Cal. 2d 325, 326. "The courts will, of course, inquire as to whether the scheme of classification and districting is arbitrary or unreasonable, but the decision of the zoning authorities as to matters of opinion and policy will not be set aside or

disregarded by the courts unless the regulations have no reasonable relation to the public welfare or unless the physical facts show that there has been an unreasonable, oppressive, or unwarranted interference with property rights in the exercise of the police power." (*Lockard* v. *City of Los Angeles, supra,* p. 461.)

Appellant, in arguing unreasonable classification, contends that a church as such is entitled to come within the R-1 zone if libraries, museums, playgrounds and public schools and other buildings owned and controlled by the city or school district are included. He relies somewhat upon *Roman Cath. etc. Corp.* v. *City of Piedmont, supra,* 45 Cal. 2d 325, but the case does not fortify his position. That was a matter of discrimination between school and school,—public and private. It was there said, at page 333: "Each case must be decided on its facts, and before us we have only the question of a private school to be located adjacent to a Catholic church in the area where public schools are found." At page 334, distinguishing the Porterville case, *supra:* "That case is distinguishable from the one under consideration. Here, only private schools are excluded—not *all* schools as were all churches in the Porterville case." All churches are excluded from R-1 by the Azusa ordinance and hence the Piedmont case, *supra,* does not apply here. Likewise, the many decisions which appellant cites to the effect that churches cannot be excluded from residential zones are of no assistance to his cause for the California law is to the contrary.

It is asserted and asseverated that the ordinance excludes churches from ninety per cent of the area of the city of Azusa and, as more than half of the other ten per cent is now devoted to other uses, the result is that less than five per cent of the total area of the city is actually available for church purposes, that much of that five per cent is located along Santa Fe and Pacific Electric rights of way or adjacent to industrial sites, and therefore "undesirable" for church locations because of obnoxious fumes,

noise, smoke and the like. This case comes up as the result of sustaining of demurrer to the second amended complaint; attached thereto or incorporated by reference are the zoning ordinances and map, but they do not show the truth of the asserted facts; so it cannot be said that the face of the ordinance shows the alleged discrimination. In this aspect of the matter the allegation of the complaint must yield to the showing of the exhibits which it undertakes to interpret (39 Cal. Jur. 2d, §62, p. 93). The averment if true is immaterial, for we are now dealing with discrimination and unreasonableness upon the face of the ordinance. When we reach the matter of a variance the question of truth of these allegations becomes pertinent and it will then appear that there was no substantial proof of the truth of same.

Without attempting to divine and justify the reasoning underlying the Azusa ordinance (not the business of this court), we find no showing on plaintiff's part that good reason did not exist for the classification found in the subject ordinance. "The burden rests upon the plaintiff to establish the invalidity of the ordinance in its application to the property involved. The plaintiff's failure to sustain this burden raises a presumption of the existence of such facts as are sufficient to sustain the ordinance. (*Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176 [56 S. Ct. 159, 80 L. Ed. 138, 101 A. L. R. 853].)" (*Beverly Oil Co.* v. *City of Los Angeles*, *supra*, 40 Cal. 2d 552, 559.) Accord: *Safeway Stores* v. *City Council, San Mateo*, 86 Cal App. 2d 277, 284; *Robinson* v. *City of Los Angeles*, *supra*, 146 Cal. App. 2d 810, 818; *De Luca* v. *Board of Supervisors*, 134 Cal. App. 2d 606, 610. The Pacific States case says, at page 185: "The order here in question deals with a subject clearly within the scope of the police power. [Citation.] When such legislative action is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or

other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.' " The contention that the instant ordinance contains arbitrary and unreasonable classification must be rejected.

The same result flows from another line of thought. Appellant has proceeded in such manner as to preclude his attacking the constitutionality of the ordinance. "[A] 'variance' presupposes the reasonableness of the zone regulation as a whole." (*Morarity* v. *Posner* (N. J.), 121 A. 2d 527, 533.) The present controversy stems from rejection of an application for a variance. Plaintiff did not initially attempt to compel issuance of a permit to him upon the theory that the ordinance is *per se* arbitrary and discriminatory. On the contrary, he applied in the first instance for a variance permitting a church in zone R-1. By so doing he precluded himself from arguing that the zoning board (City Planning Commission) has no power (because of invalidity of the ordinance) to grant the concession, the variance which he seeks.

It is so held in *Rubin* v. *Board of Directors*, 16 Cal. 2d 119. The court there said, at pages 124-125: "Unlike the 'spot zoning' obtained by amendment of the general zoning ordinance, a variance or exception sanctions a deviation from the standard under the dispensing power vested in the administrative body. . . . On the other hand, the grant of dispensation is a matter of grace, and a refusal is not the denial of a conditional statutory right; it merely leaves in operation the statute adopted by the legislative body. (*People ex rel. Fordham M. R. Church* v. *Walsh, supra.*)

"The application for a variance necessarily admits the constitutionality of the ordinance under which the city officials charged with the duty of administering a zoning ordinance are asked to exercise a discretion; therefore, an applicant may not challenge its constitutionality before the administrative body. For if an attack on constitutional grounds was successful, the discretionary power of the board would also fall. In a proceeding to review a decision

denying a variance, it has been held that 'the sole question before the court is the propriety of the action of the board upon the application addressed to its discretion, and the petitioner will not be heard upon the question of the constitutionality of the act of the Legislature under which the ordinance was enacted.' " Also, at page 126: "But the finality of the board of directors' determination does not bar the respondents from asserting in a judicial proceeding that the zoning law is unconstitutional as applied to their property. . . . When the board of directors of Pasadena denied petitioners' application for a variance it did not take away a property right, but merely refused to grant a favor. Its action left the petitioners' property subject to the zoning restrictions then in force." This decision was applied in *Metcalf* v. *County of Los Angeles,* 24 Cal. 2d 267, 272, and *Hadden, Inc.* v. *City of Inglewood,* 101 Cal. App. 2d 47, 48. Upon oral argument counsel for appellant conceded that this line of cases leaves open to him only the claim that the denial of a variance amounted to discriminatory application of the ordinance to appellant's property.

The matter of variances is covered by Articles XIX of Ordinance No. 409. Section 19.1 authorizes them in the following language: "When practical difficulties, uncessary [sic] hardships, or results inconsistent with the general purposes of this Ordinance occur through a strict interpretation of its provisions, the Commission, upon its own motion may or upon the verified application of any property owner or owners, shall in specific cases initiate proceedings for the granting of a variance from the provisions of this Ordinance under such conditions as may be necessary to insure that the spirit and purpose of this Ordinance will be observed, public safety and welfare secured, and substantial justice done. . . ." Section 19.2: "Before any variance may be granted, it shall be affirmatively shown: (a) That there are special circumstances attached to the property referred to in the application or motion, which do not apply generally to other properties in the same Dis-

trict; (b) That the granting of such variance is necessary to do substantial justice, and to avoid practical difficulty, unnecessary hardship, or results inconsistent with the general purpose of this Ordinance; (c) That the granting of the variance will not result in material damage or prejudice to other property in the vicinity, nor be detrimental to the public health, safety, or general welfare." The application must be referred immediately to the Planning Commission for hearing (§19.3). Section 19.4 provides that the application shall be accompanied by: "(d) Evidence of the ability and intention of the applicant to proceed with actual construction work in accordance with said plans within ninety (90) days from the date of granting said application." Section 19.5: "The Commission shall cause such investigations of fact bearing on the application to be made as will provide necessary information to insure that the action on each application is consistent with the intent and purpose of this Ordinance." A public hearing is required and a "verbatim transcript of all testimony offered at a public hearing, together with the names and addresses of all persons testifying shall be recorded and made a part of the permanent files of the case." (§19.6) The commission is required to render "a report and recommendation to the City Council" (§19.7) which shall review the same and may confirm, reverse or modify the action of the commission without a hearing after having read the complete verbatim transcript of the commission hearing. The council may also "[s]et the matter for public hearing before itself, make its own findings and grant or deny the application accordingly." (§19.8, subd. (3).) "The action of the City Council upon an application for a variance is final and conclusive as to all things involved in the application." (§19.8.)

In the present instance there were two hearings, one upon an original application for a variance and the other upon a "verified supplement to petition for variance," which latter document was filed after the commission and the council had denied the original application. The complaint

incorporates the complete transcript of each hearing before the commission, also the minutes of the City Council.

A proceeding for a variance is initiated upon motion of the commission or "upon the verified application of any property owner or owners" (§19.1). Respondent questions appellant's status as an applicant. The record shows that appellant (who is acting as trustee for the congregation and pursuant to its authority) never acquired title to the property covered by his application. He entered into an arrangement with the owner by which he agreed to purchase the lot provided he was able to secure a variance for construction of a church thereon. He testified before the commission: "*Mr. Minney:* We bought it with the understanding that if a church could be erected, the lot would be ours. *Mr. Teasley:* Then actually you will not lose any money? *Mr. Minney:* No, we will lose nothing except time and a good location for a church." The reply brief says that "appellant would not lose the deposit of money made on the option to purchase" if the variance is not effectuated. The supplement to petition alleges that "the property is now held in escrow." Oral argument indicated that plaintiff held an option to purchase at the time of the first hearing, that the matter had progressed to an escrow at the time of the second, but that plaintiff has never been in danger of losing anything if the deal is frustrated by denial of a variance. The purchase having been made upon condition of a variance being issued, and plaintiff having paid nothing irrevocably, it can hardly be said that he is the owner within the purview of the ordinance which makes ownership the criterion of a right to file a petition. (Cf. 1 Yokley on Zoning Law and Practice (2nd Ed.), 1957 Supp., p. 92, §134; *Lee* v. *Board of Adjustment* (N. C.), 37 S. E. 2d 128, 131.) This question of Rev. Minney's right to file the application for variance is so closely related to that of hardship that it need be pursued no further.

Section 19.1 predicates the granting of a variance upon "practical difficulties, unnecessary hardships, or results in-

consistent with the general purposes of this Ordinance." Section 19.2(b) requires an affirmative showing inter alia that a variance is required to avoid unnecessary hardship. It appears that plaintiff did not canvass the area for other church sites but took an option on this one with full knowledge of the zoning and upon condition that he could obtain a variance. Self-inducted hardship is not within the purview of the ordinance. Only that type of hardship which inheres in the particular property is recognized,—such as inability to use it for purposes of its existing zoning caused by the prevailing uses of surrounding property. Examples of cognizable hardship are given in *Wilkins* v. *City of San Bernardino, supra,* 29 Cal. 2d 332, 340. "A 'variance' for undue hardship is grounded in conditions peculiar to the particular lot as distinguished from other property in the use district." (*Beirn* v. *Morris* (N. J.), 103 A. 2d 361, 364.) See, also, *Preye* v. *Board of Adjustment* (N. J.), 91 A. 2d 597, 602; *In re Michener's Appeal* (Pa.), 115 A. 2d 367, 371. Subdivision (a) of §19.2 of the Azusa ordinance so provides: "That there are special circumstances attached to the property referred to in the application or motion, which do not apply generally to other properties in the same District."

One who purchases property in anticipation of procuring a variance to enable him to use it for a purpose forbidden at the time of sale cannot complain of hardship ensuing from a denial of the desired variance. (*Gleason* v. *Keswick Improvement Ass'n.* (Md.), 78 A. 2d 164, 165-166; *Preye* v. *Board of Adjustment, supra,* p. 604; *Union Free School Dist.* v. *Village of Hewlett Bay Pk.*, 102 N. Y. S. 2d 81, 83; affirmed, 103 N. Y. S 2d 831; *Selligman* v. *Von Allmen Bros.* (Ky.), 179 S. W. 2d 207, 210; *Beirn* v. *Morris, supra,* p. 364; *Clark* v. *Board of Zoning Appeals of Hempstead* (N. Y.), 92 N. E. 2d 903; 1 Rathkopf, The Law of Zoning and Planning, §3, p. 748.)

The burden of appellant's main attack upon the city's denial of a variance is that of alleged discrimination growing out of the fact that other churches have been granted

variances permitting them to build in the R-1 zone. The specifications are Concordia Lutheran Church on September 28, 1949; First Christian Church, August 31, 1950; Church of Christ, May 10, 1951; Church of the Nazarene, August 29, 1951; Emanuel Baptist Church, January 7, 1954. The Emanuel parcel lies immediately south of plaintiff's lot; the variance was in effect at the time of the first hearing and denial but had lapsed before hearing was had upon appellant's supplemental application. It also appeared at the hearing that the Catholic, Presbyterian and Friends churches are located outside the R-1 zone, but when they were erected is not shown. That the commission and the council have not discriminated against churches as such is witnessed by the five variances just mentioned.

Appellant centers upon the Emanuel Baptist Church variance for a lot in the same block with plaintiff's and insists that that of itself proves unwarranted discrimination as matter of law. The authorities are to the contrary. "Prior exceptions granted by the adjustment board are not in themselves controlling. Ill-advised or illegal variances do not furnish grounds for a repetition of the wrong. If that were not so, one variation would sustain if it did not compel others, and thus the general regulation eventually would be nullified. The annulment of zoning is a legislative function that is beyond the domain of the zoning board." (*Potts* v. *Board of Adjustment* (N. J.), 43 A. 2d 850, 854.) "The nonconforming uses do not justify the variance sought. If the rule were otherwise, one variation would sustain if it did not compel others, and thus the general regulation would in time be rendered abortive. [Citations.] A variant use of plaintiff's lands would necessarily be the basis for others and thus the disintegrating process would be set in motion." (*Beirn* v. *Morris, supra* (N. J.), 103 A. 2d 361, 364.) To the same effect are, *Moriarity* v. *Pozner, supra,* (N. J.), 121 A. 2d 527, 534; *Scaduto* v. *Town of Bloomfield* (N. J.), 20 A. 2d 649, 651; *Ventresca* v. *Exley* (Pa.), 56 A. 2d 210, 212; *Chudnov* v. *Board of Appeals of Town of Bloomfield*

(Conn.), 154 A. 161, 164; *Young* v. *City of Abilene* (Tex.), 195 S. W. 2d 838, 840; *Van Meter* v. *Westgate Oil Co.* (Okla.), 32 P. 2d 719, 721-722; *Brous* v. *Town of Hempstead*, 69 N. Y. S. 2d 258, 261; *O'Connor* v. *Mayor and Council of Borough* (N. J.), 65 A. 2d 127, 129; *Hay* v. *Board of Adjustment of Borough of Fort Lee* (N. J.), 117 A. 2d 650, 653; 58 Am. Jur. §205, p. 1052; 168 A. L. R. 42 Anno. This is also the California Law. "It was not a denial of plaintiffs' constitutional right to the equal protection of the laws for the city of Los Angeles to discriminate against plaintiffs by granting variances to some property owners and refusing a variance grant to plaintiffs in the same district." (*Otis* v. *City of Los Angeles, supra* 52 Cal. App. 2d 605, 613.) "If an owner could compel the extension of the boundaries of the 'island,' by any such showing, then the next adjoining owner in turn could likewise make the same kind of a showing and obtain another extension of the 'island' to his property, and in a short time there would be an end to the effectiveness of all zoning legislation." (*Wilkins* v. *City of San Bernardino, supra*, 29 Cal. 2d 332, 341.) "The fact that variances may have been granted to some owners and denied to others, however, does not establish unreasonable discrimination. The granting or denial of variances rests largely in the discretion of the body designated by the zoning ordinance for that purpose, and a denial of a variance will not be disturbed in the absence of a clear showing of abuse of discretion." (*County of San Diego* v. *McClurken*, 37 Cal. 2d 683, 691.)

Appellant insistently claims that there was prejudice against Jehovah's Witnesses which controlled the decision of the zoning authorities. The only evidence to which counsel can point is the statement of one objector at the first hearing who testified "Stemrich: I am not prejudiced, but if people know that there is a Witness church in the neighborhood they would just as soon move out. Hawkins: Would any other church do it? Stemrich: As far as I am concerned all religions are the same but there are some

people that have different outlooks." There is nothing in the record to raise an inference that the committee or the city council adopted Stemrich's view. The inference from the hearing record seems plain that petitioner and his associates sought to ride through the hearing upon the emotional issue of prejudice against Jehovah's Witnesses, buttressed by the claim of absolute right of a church to have a variance when and where it desires. Rev. Minney's showing at this original hearing was little more than pro forma.

It consisted of submission of plans and drawings of the proposed church building, simple in design, finished with stucco outside and plaster inside, to occupy 2500 square feet, and cost approximately $12,000; assurance was given that the portion of the lot not occupied by the building would be blacktopped for off-street parking. Days and hours of customary services were stated, the congregation was said to have as members 70 residents of Azusa, and the meetings were declared to be orderly and not noisy. No evidence was adduced by applicant on the subjects of special circumstances surrounding the particular property necessity of avoiding practical difficulties, unnecessary hardship or results inconsistent with the purpose of the ordinance; no evidence was presented concerning damage or prejudice to other property in the zone and no attention given orally to the general welfare. All of this seems to have been proffered or omitted upon the assumption of a legal right to a variance for a church. Petitions opposing the variance, signed by 47 residents of the immediate neighborhood, were presented and various persons spoke in opposition to the application, each assigning his own reasons as would be expected. They concern mainly a desire for a quiet neighborhood and objection to increased traffic. The commission was required to make a factual investigation before the hearing and presumptively did so. As the decision had to be reached in the light of the comprehensive zoning plan and of existing and future conditions, the members of the commission necessarily had to supplement the testimonial show-

ing by resort to their own knowledge. (See, 1 Yokley, Zoning and Law and Practice (2nd ed.), §127, p. 308.) The application was denied because of "approximately 47 names being presented in protest and representation in the audience protesting another church in this area." While objections of property owners cannot control the decision they are not to be disregarded. (*City of Stockton* v. *Frisbie & Latta*, 93 Cal. App. 277, 281, 295.) On September 7, 1954, the council denied the application: "Due to the number of protests filed with the Council by people in the immediate vicinity."

In January, 1955, appellant filed his "Verified Supplement to Petition for Variance" claiming prejudice against Jehovah's Witnesses and breathing defiance to the zoning authorities. It does pay formal obeisance to constituted authority, saying in paragraph XV: "I am making this application for a variance so as to render 'unto Caesar that which belongs to Caesar', for the purpose of orderliness and complying with the regulations and ordinances of the City of Azusa." It seems unfortunate that that other precept of the Master was not kept in mind: "And whosoever shall compel thee to go a mile,[2] go with him twain." (Matthew 5:41.)

Immediately following the sentence above quoted, paragraph XV continues: "I contend, however, under the Constitution of the United States and the Constitution of the State of California, that the ordinances of the City of Azusa above quoted, which require a variance for a church to be built in any neighborhood, except in an R-3 zone . . . are void because no city or political subdivision or state authorities thereof have the right to require a variance before a piece of property can be used for a church." Paragraph XIX: "I anticipate that the Planning Commission of the City of Azusa and the City Council will deny this application, as the Planning Commission and the City Council previously denied my application." Paragraph XXX: "Said

[2] Referring to impressment by Caesar's soldiers (see, Barklay on The Gospel of Luke, p. 295).

sections of the code have been enforced by the Planning Commission and the City Council so as to authorize many of the orthodox and popular religions to build church buildings or repair or add additions thereto in the City of Azusa since the passage of said measures, while discriminating against the Jehovah's Witnesses."

This petition was followed by a hearing before the Planning Commission on February 2, 1955, at which additional evidence was taken. It was devoted largely to the traffic question. A new objectors' petition was presented containing some 109 names, and "setting forth various reasons such as depreciation of property values, noise and traffic, improper zoning in that it was all R-1 originally." Concerning this latter point Mr. Stemrich testified: "The only thing that I have against buildings going in that area is that if one is granted then there will be more granted. There is quite a bit of vacant property there and if the variance is granted, more buildings and apartments will be built." Photographs attached to the complaint show this neighborhood to be largely undeveloped. But a "growing residential area is as reasonable an object of protection as one which is fully built up." (*Jones* v. *City of Los Angeles,* 211 Cal. 304, 309.)

Plaintiff said that a church would not "devaluate" his own residence property within the zone nor would it add to its value. Asked if there were any special circumstances applicable to this property, he said: "Yes, the property next door and then, of course, the church across the street are R-3 and R-4. The land is not generally developed. The street is black topped half the distance." The "property next door" seems to refer to the Baptist parcel, and "the church across the street" is nonexistent.

The supplemental application says: "I desire to state, also, that we will plant suitable plants, trees and shrubs, and our congregation is fully prepared to carry the financial burden, and are able to do so, necessary to complete construction." Section 19.4, subdivision (d), requires proof of

ability and intention to proceed with actual construction work within 90 days from granting of application. No affirmative evidence to this effect was offered by applicant. When interrogated by the chairman of the board he testified: "Teasley: According to the ordinance you have to start work within 90 days after the ordinance is granted, and you have a right to request an extension of time—can you start your work within 90 days? Minney: We can start before 90 days. Teasley: Can you show us proof that you can? Minney: We are prepared to go ahead with this matter. We can't show you any financial statement but we have the money available. Shier [attorney for petitioner]: There is a party that is going to loan the money to the congregation—it will be paid for completely." The showing went no further. In the first hearing plaintiff testified the building would cost $12,000; in the second he said the cost would be $15,000. The price of the lot (as yet unpaid) was not given. The name of the prospective lender was not disclosed; his ability to perform was not shown; whether he had legally bound himself to make the loan does not appear. Certainly the commission was justified in rejecting this as proof of one of the matters which must be shown affimatively upon such an application.

As a result of this hearing the commission found that the Baptist permit was no longer outstanding, many protests from residents residing within 300 feet from the property had been received, many residents in the locality had purchased homes because they were situated in an R-1 zone, these homes were built some years before appellant's application for variance was made, the erection of a church in the locality "would be detrimental to and reduce valuation of properties in said vicinity"; also that a variance "would be inconsistent with the general purposes of the ordinance"; that applicant had failed to show that he had the ability to proceed with actual construction within 90 days. It was therefore recommended that the variance be denied. The matter came before the council on February 21st and it

denied the application "upon all the ground[s] as set forth in the resolution of the Planning Commission."

At none of the hearings before the commission or council was any proof made in support of the claim that the ordinance excludes churches from 90 per cent of the area of the city, that less than 5 per cent thereof is actually available for church purposes and that much of that 5 per cent is located along railroad rights of way and other industries. This matter was inherent in the issues of practical hardship etc. which the planning commission was required by ordinance to consider at the hearing before it. The ordinance and zoning map do not support the allegation,—not without the aid of oral explanation and application to the city's entire area. Of course, the application for variance is not evidence of the truth of its own averments. The complaint makes these allegations, but averments of the pleading cannot fill any hiatus in the proof before the commission and City Council for the courts have no jurisdiction to grant a hearing de novo. (*Wheeler* v. *Gregg*, 90 Cal. App. 2d 348, 361; *Steiger* v. *Board of Supervisors*, 143 Cal. App. 2d 352, 356.)

A clear showing of abuse of discretion is essential to a successful attack upon the granting or denial of a variance (*Wilkins* v. *City of San Bernardino*, *supra*, 29 Cal. 2d 332, 338, 343; *County of San Diego* v. *McClurken*, *supra*, 37 Cal. 2d 683, 691; *Beverly Oil Co.* v. *City of Los Angeles*, *supra*, 40 Cal. 2d 552, 559; *Otis* v. *City of Los Angeles*, *supra*, 52 Cal. App. 2d 605, 614, 615; *Steiger* v. *Board of Supervisors*, *supra*, 143 Cal. App. 2d 352, 357), for every intendment favors a valid exercise of the police power by the zoning authorities (*Wilkins* v. *City of San Bernadino*, *supra*, 338-339; *Lockard* v. *City of Los Angeles*, *supra*, 33 Cal. 2d 453, 461, 467; *Acker* v. *Baldwin*, *supra*, 18 Cal. 2d 341, 344; *Otis* v. *City of Los Angeles*, *supra*, 613), and there is a presumption that the necessary facts have been ascertained and found by the zoning commission. (*Bartholomae Oil Corp.* v. *Seager*, 35 Cal. App. 2d 77, 80; *Wheeler* v. *Gregg*, *supra*,

90 Cal. App. 2d 348, 360; *Steiger* v. *Board of Supervisors, supra,* 356; *North Shore etc. Assn.* v. *County of Los Angeles,* 70 Cal. App. 2d 598, 608; *Schumm* v. *Board of Supervisors, supra,* 140 Cal. App. 2d 874, 880; *Lindell Co.* v. *Board of Permit Appeals,* 23 Cal. 2d 303, 323.) Moreover, it is manifest that failure to prove any of these matters required by the ordinance must result in a denial of a variance application. Appellant failed to make the necessary proof under the ordinance and there has been no showing of abuse of discretion on the part of the commission or the City Council.

Appellant's attorneys argue, however, that the discretion here exercised was an arbitrary one because the ordinance did not prescribe sufficiently definite standards for the exercise of discretion by the commission. It is apparent from the ordinance that the commission does not decide but merely recommends appropriate action to the City Council. It is settled that such power to hear and recommend may be delegated validly to the commission. (*Johnston* v. *Board of Supervisors,* 31 Cal. 2d 66, 73; *Hopkins* v. *MacCulloch,* 35 Cal. App. 2d 442, 450; *Meyers* v. *Board of Supervisors,* 110 Cal. App. 2d 623, 630; *Wheeler* v. *Gregg, supra,* 90 Cal. App. 2d 348, 363; *Steiger* v. *Board of Supervisors, supra,* 143 Cal. App. 2d 352, 355-356.) Of course, reasonably definite standards must be prescribed as a basis for board action, but the degree of definitiveness must be tested according to the inherent uncertainties in the subject matter. "A zoning ordinance places limitations upon the use of land within designated areas in accordance with the general policy adopted by the legislative body. The ordinance may be arbitrary and discriminatory in isolated cases as applied to certain property, and compliance therewith may present unusual difficulties in many other instances. But it is manifestly impracticable, if not impossible, to enumerate in the ordinance itself the varied factual situations to which the ordinance is not applicable because of constitutional objections or other special considerations. Consequently, almost every zoning ordinance, including the one under considera-

tion, contains provisions whereby an owner may apply to an administrative body for permission to put his land to a nonconforming use." (*Metcalf* v. *County of Los Angeles, supra,* 24 Cal. 2d 267, 270) "The statutory rule of 'unnecessary hardship' as a guide for variances, has been generally upheld as adequate." (20 Law and Contemporary Problems, p. 291.) See, also, 1 Yokley, Zoning Law and Practice, 2nd ed.) §135, p. 327. Standards no more specific than those at bar have been held adequate in *Hilton* v. *Board of Appeals of City of Geneva,* 18 N. Y. S. 2d 213, 217; *Maxwell* v. *Klaess,* 82 N Y. S. 2d 588, 590, 592; *Bishop* v. *Board of Zoning Appeals* (Conn.), 53 A. 2d 659, 662; *Potts* v. *Board of Adjustment* (N. J.), *supra,* 43 A. 2d 850, 853-854. See, also, standards prescribed by the Legislature of this State in §65853, Government Code. This record does not warrant the conclusion that arbitrary power was conferred upon the commission or that the power delegated to it was arbitrarily exercised.

Do all of the foregoing principles fall into the discard when a religious organization asserts a right to a variance? This question has been answered in the negative in *West Hartford Meth. Ch.* v. *Zoning Board of Appeals* (Conn.), 121 A. 2d 640, 643; *Galfas* v. *Ailor* (Ga.), 57 S. E. 2d 834, 836; *Miami Beach United Lutheran Church of the Epiphany* v. *City of Miami Beach* (Fla.), 82 So. 2d 880. In the last cited case it is said, at page 882: "It seems that the appellant bought the property with knowledge of the zoning restrictions when, as we understand the record, sites for churches were available in other parts of the city. The restrictions were imposed by an ordinance that was presumptively valid, so the appellant in this suit assumed the 'extraordinary' burden of alleging and proving that the ordinance was invalid. . . . It is commonly known that generally the activities of the present-day churches are wide and varied as, indeed, they should be. The use of church buildings and facilities is not confined to worship periods on Sunday and mid-weekly prayer and meetings. They are

often used as places of instruction and entertainment. We do not frown upon these activities; on the contrary we think they should be promoted and encouraged. But we do not agree that because of the merits of these activities it can be said that an infringement of the constitutional rights of the owner results if it is not allowed use of the property for such purposes in the midst of a section of the city which has been restricted, and which the appellee in this instance knew had been restricted, primarily to homes to be occupied by individual families." With this we agree.

City of Chico v. *First Ave. Baptist Church, supra,* 108 Cal. App. 2d 297, involved the assertion of church immunity to an ordinance requirement of obtaining a special use permit for a church in a residential zone, and it was held that "*Corporation of Presiding Bishop of the Church of Jesus Christ* v. *City of Porterville,* 90 Cal. App. 2d 656 [203 P. 2d 823], seems to be a complete answer to appellant's contentions." (P. 301.)

It also appears from the record in the Porterville case, *supra,* that the litigation actually arose out of the city's denial of a variance requested by the church and the court's ruling necessarily recognized application of the presumptions and other principles therein discussed to a variance proceeding.

It is apparent that the complaint could not be successfully amended and hence the demurrer was properly sustained without leave.

Judgment affirmed.

ASHBURN, J

We concur.

FOX, P. J.
HERNDON, J.